IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

No. A20 of 2016

BETWEEN

PRINCE ALFRED COLLEGE INCORPORATED
Appellant

and

A, DC
Respondent

APPELLANT'S REPLY

PART I PUBLICATION

10 1. This submission is suitable for publication on the Internet.

PART II CONCISE REPLY TO THE ARGUMENTS OF THE RESPONDENT

Vicarious liability

2. The respondent's essential submission is that he succeeds on the tests propounded by the majority of judges in *Lepore* (RS [12]).

3. In the disposition of the three appeals in *Lepore*, six members of the Court (McHugh J dissenting) rejected any claim based on a non-delegable duty of care, and made orders dismissing the Queensland appeals (*Samin v Queensland, Rich v Queensland*), and allowing the New South Wales appeal (*NSW v Lepore*), the effect of which was not to determine but to permit a repleading or retrial of any question of vicarious liability. McHugh J did not consider vicarious liability.

20 4. Of the six majority judges, the effect of the reasons of Callinan J and of Gummow and Hayne JJ is to deny vicarious liability on the facts of the present case. The appellant contests the respondent's analysis of the application of the other approaches to this case.

5. Gleeson CJ. In *Lepore* the assaults occurred in the context of supposed misbehaviour (see at [7]), and Gleeson CJ indicated that there "may have been an arguable case" of vicarious liability, noting that chastisement of a pupil is within the course of a teacher's employment (at [12]). Since the trial miscarried, and because of defcient fact-finding, he agreed that at a new trial the plaintiff could plead a case in vicarious liability (at [78]):

> [T]he maintenance of discipline is clearly within the employment responsibilities of the teacher, and much, perhaps all, of the alleged misconduct appears to have taken place in the context of
30 administering punishment for supposed misbehaviour. It **may be possible** that some or all of it could properly be regarded as **excessive chastisement**, for which a school authority would be vicariously liable. … Whether excessive or inappropriate chastisement results from the sadistic tendency of a teacher, or a desire for sexual gratification, or both, it is conduct in the course of employment, for which a school authority is vicariously liable. If, on the other hand, some or all of the conduct of the teacher was found to be **so different from anything that could be regarded as punishment that it could not properly be seen as other than merely sexually predatory behaviour**, then, in relation to such conduct, the plaintiff would have no case based on vicarious liability. [Emphasis added]

6. In relation to the *Samin* and *Rich* appeals, Gleeson CJ said that findings about a number of matters
40 would be necessary, including findings both as to the teacher's powers and responsibilities, and the nature of his conduct, but "[i]t would not be enough that his position provided him with the opportunity to gratify his sexual desires, and that he took advantage of that opportunity" (at [85]). These observations do not support the submission that Gleeson CJ's approach would result in liability in this case. Indeed, the Chief Justice warned (at [72]):

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> I do not accept that the decisions in *Bazley, Jacboi* and *Lister* suggest that, in Canada and England, in most cases where a teacher has sexually abused a pupil, the wrong will be found to have occurred within the scope of the teacher's employment.

7. Gleeson CJ elsewhere emphasised the need to distinguish cases where employment duties provide the opportunity for offending from cases where the tasks actually allocated to the teacher were closely connected with the offending (see at [43], [46]). He emphasised, for example, that in *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, the duties of the employee involved "physical possession of, and dealing with, the fur" (at [48]).

8. Critically, Gleeson CJ appreciated the potential for error that would result if the "authorised acts" of an employee were pitched at too high a level of generality (at [51]). It was necessary to look closely to the "specific responsibilities" (at [52]). So it was that he acknowledged the potential for vicarious liability in respect of sexual abuse involving improper touching "by a person whose duties involve intimate contact with another" (at [54]). This observation was made immediately before referring to *Bazley v Curry* [1999] 2 SCR 534, in which the employee's duties involved the bathing and tucking in of emotionally troubled children (see at [54]). The Chief Justice contrasted the facts in *Jacobi v Griffiths* [1999] 2 SCR 534 where vicarious liability was not made out.

9. Gleeson CJ's emphasis on whether the actual tasks allocated to the teacher involved intimacy, and the contrast he drew with opportunistic offending which was merely made possible by the employment, supports the essential submission of the appellant in this case regarding the Full Court's error. The reasoning of Kourakis CJ and Peek J was to the following effect: had the prefects failed in the task allocated to them, it may have been necessary (and acceptable) for Bain to engage in settling, and because this might involve "intimacy", there was thereby a relevantly close connection between the employment and the offending. But, on the evidence, it could not be found that the tasks actually allocated to Bain involved, in effect, anticipating the ineffectiveness of the prefects, and sitting on a child's bed in the dark to tell stories when attempting to settle them. The trial judge was right on the evidence to say that it was not proved that what Bain in fact did was what he was required to do.

10. Further, while excessive chastisement could be closely connected to physical punishment which, in earlier times, was thought appropriate, it is difficult to see how "settling" and "sexual touching" could be seen to bear the same relationship of degree. The latter is not an extreme form of the former: it is entirely unrelated. Moreover, Bain's conduct was not similar to any legitimate function he might have performed. Bain's inappropriate touching was not physically similar to legitimate touching, for example, of a kind involved when duties involve bathing a vulnerable child.

11. Gaudron J. Her Honour's approach was founded in agency and estoppel. She said (at [131]-[132]):

> Ordinarily, a person will not be estopped from denying that a person was acting as his or her servant, agent or representative unless there is a close connection between what was done and what that person was engaged to do...
>
> In [*Lepore*] it seems there may have been a close connection between the acts of the teacher and that which he was authorised to do, namely, chastise the plaintiff for his misbehaviour. Moreover and more to the point, it may be that by acquiescing in the teacher's use of the storeroom for the purposes of chastisement or, even, in having a secluded room which might be so used [the State] is estopped from contending that the teacher was not acting as its servant, agent or representative in doing what he did in that room.

12. Her Honour offered no intimation as to whether estoppel was even arguable in the appeals of *Samin* and *Rich*, but it is respectfully submitted that it is highly unlikely that an estoppel analysis would avail the respondent in this case. There is no basis for a finding that the respondent would have considered that the actual acts Bain carried out were being carried out on behalf of the school, let alone that, if so, that belief was attributable to a holding out that would bind the conscience of the school (cf. RS [20]). Excessive chastisement stands in a very different category to sexual assault.

13. Gummow and Hayne JJ. On the approach of Gummow and Hayne JJ (at [243]-[244]), the respondent fails. The respondent contends that Gummow and Hayne JJ distorted the approach of Dixon J in *Deatons*. Contrary to the respondent's submission (RS [27]), their Honours did not err by describing the

wrongful act with such specificity that it was obviously beyond authority (RS [27]). For the reasons just explained, that approach was consistent with that of Gleeson CJ and Gaudron J, who favoured a precise analysis of the actual conduct and a comparison with the duties allocated to the teacher.

14. Further, it was not artificial to distinguish *Lloyd* and *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 because in those cases the employer gave or cloaked the employee with authority to carry out the very acts which were carried out, albeit for an illegitimate purpose, those acts being a critical component of the wrongful conduct. Indeed, the employee in both cases was able to commit physical elements of the wrongful conduct by carrying out the very tasks actually allocated by the employer. It is not the case that Bain "had authority to be 'intimate' with the boarders, including to comfort, supervise and reassure the respondent" (RS [27]). But, regardless, there is a distinction between a conclusion that there might be occasions when comforting or settling came within Bain's authority, and a conclusion that, when doing the things Bain actually did despite the absence of any apparent need to comfort or settle, he was carrying out any task or duty actually allocated to him.

Non-delegable duty

15. Whatever the divergence amongst the majority judges about vicarious liability in *Lepore*, six members of the Court held that the non-delegable duty owed by a school did not render a school liable for intentional criminal wrongdoing of the kind in question here: [34], [39] (Gleeson CJ), [105] (Gaudron J), [270] (Gummow and Hayne JJ), [296] (Kirby J), [340] (Callinan J).

16. Despite this, the respondent has not addressed the cautionary principle which attends any reconsideration of a decision of this Court: *Attwells v Jackson Lalic Lawyers* [2016] HCA 16 at [31]. None of the criteria which would incline the Court to reconsider is engaged here. The respondent simply reargues the points made in *Lepore* (see at 520, 521), considered by McHugh J, and rejected by the majority.

17. With respect, the essential fallacy in the respondent's submission is to reason that because, in some cases, a tortfeasor may be held liable in negligence for deliberate conduct, there is no reason why a non-delegable duty is not contravened by intentional criminal wrongdoing. However a non-delegable duty is an exceptional, and strict, form of liability, the limits of which are necessarily and legitimately influenced by policy considerations and an analysis of the nature of the responsibility assumed by the party owing the duty. It is one thing for the law to require that in the context of particular relationships (hospital and patient, school and pupil) the undertaking to exercise reasonable care cannot be discharged merely by the engagement of competent employees or agents; it is another to require that the party should be taken to insure against the deliberate criminal wrongdoing of those agents or employees. As Gleeson CJ said (at [31]):

> A responsibility to take reasonable care for the safety of another, or a responsibility to see that reasonable care is taken for the safety of another, is substantially different from an obligation to prevent any kind of harm. ...**Intentional wrongdoing, especially intentional criminality, introduces a factor of legal relevance beyond a mere failure to take care.** [Emphasis added]

18. As in other areas, the law attaches particular consequences to intentional criminal wrongdoing (cf. AS [37], *Lepore* at [342] (Callinan J)). To extend non-delegable duties to intentional criminal misconduct would outflank, and render irrelevant, the boundaries drawn in respect of vicarious liability. Liability would travel past "the scope of employment" (however that concept is understood) because, as Gleeson CJ recognised (at [32]) "[i]t is enough that the victim has been injured by an employee on an occasion when the employer's duty of care covered the victim". The respondent's submissions do not address the need to observe this fundamental consideration of coherence.

"Direct" breach of duty: negligence

19. The respondent's case suffers from at least three vices: first, it ignores the historical context in which negligence must be considered; secondly, it ignores the flaws and gaps in the evidence at trial; thirdly, it ignores the standards of the time of the asserted breach more than half a century ago.

Historical Context

20. The respondent led no evidence at trial on the general administration and operation of boarding schools in the early 1960's. The evidence before the trial judge established the following matters: (1) Boarding

schools were run by members of the teaching staff of the school (housemasters), resident tutors or assistants (such as old scholars) and resident prefects.[1] A Chaplain and resident Matron provided a further source of support and guidance for the boys. It was unexceptional for prefects to play a significant role in the operations of the Boarding School.[2] (2) The boarding school was managed by the Senior Housemaster and subject to the oversight of the Headmaster.[3] (3) It was both impractical and unreasonable to implement a system of supervision which prohibited students from being alone with a housemaster.[4] (4) The concept of "child protection" was not a topic of discussion in the early 1960's. It was not on television programmes or the subject of public discussion or debate.[5] (5) Police checks as now understood did not exist.

21. The three limbs to the respondent's negligence case were rightly dismissed by the trial judge and Kourakis CJ (FC[26]-[37]), with whom Peek J agreed (FC[263]). The respondent's notice of contention must therefore overcome these concurrent findings.

The deficiencies in the evidence

22. The respondent's submissions require a departure from the principles explained in *ASIC v Hellicar* (2012) 247 CLR 345 at [165]: "Disputed questions of fact must be decided by a court according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led. Principles governing the onus and standard of proof must faithfully be applied."

23. Pre-employment enquiries: The evidence led by the respondent concerning "police checks" was unsatisfactory at many levels[6] and, in any event, did not establish a formal process through which a member of the public having a legitimate interest in the criminal record of another could lawfully obtain such information (TJ [127], [134]). As late as 2001 it was simply not standard practice amongst private schools to conduct criminal record checks (TJ [122], [128], [134]).[7]

24. Bain's conduct at Cummins Area School was the subject of rumour (TJ[130]). There was no evidence to permit a finding that this was conveyed to the appellant (TJ [133]). The concurrent findings made by the trial judge, Kourakis CJ (FC[28]-[32] and Peek J (FC[263]) were inevitable. Gray J's treatment was not supported by the evidence and involved an inversion of the burden of proof (RS [50]-[52]). Gray J's reliance on a suggested failure by the appellant to prove employment practices is unsustainable (FC[91]); it remained for the respondent to prove that the appellant breached its duty. Criticism of the appellant is not a makeweight for a failure in proof.

25. Adequacy of supervision: The respondent's submissions on the adequacy of supervision of Bain's activities in the boarding house (RS [53]-[55]) provide a paradigm example of the respondent's use of contemporary standards when determining whether the appellant's acts or omissions constituted a breach of duty in 1962. The then practice relied on prefects. The unchallenged evidence was that the extent of the supervision required by the respondent's assertion was impractical (TJ[151]). The trial judge (TJ [148]) and Kourakis CJ recognised the circularity inherent in the suggestion that the fact of the abuse revealed inadequate supervision (FC[33]). Bain's conduct was both insidious and covert (TJ [149], [149]). On the evidence, it is not possible to describe the system as other than adequate and reasonable having regard to the standards of the early 1960's.

26. Supervision of the respondent's welfare: A number of uncontested facts undermine the respondent's contention that the post disclosure conduct of the appellant constituted a breach of duty: (1) The respondent's parents were told by the agents of the school that the respondent had been sexually abused

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[1] T1048.22-35; T1051.30-37; T1385.11-20.
[2] T1385.15-20.
[3] T1385.32-1386.1.
[4] T1386.2-15.
[5] T1391.8-14. Mr Bean, the next headmaster of the appellant, compared his experience in the 1970's and 1980's with later social and legislative developments which made these topics a "very important and very prevalent matter of discussion in society and in the media."
[6] The evidence did not permit any inference to be drawn as to what would have been on Bain's manual criminal record, if anything, as Bain was dealt with by the courts in 1954: D66. Bain was born in December 1935. He was therefore 19 years of age at the time he was dealt with by the courts. Bain was an "infant" at the time of his conviction as the *Age of Majority Reduction Act 1971* (SA) had not then been passed.
[7] Gray J agreed with the trial judge's findings (FC [86]).

(TJ [156]).[8] (2) The boarders were invited to come forward and speak to the Chaplain (and Matron) if they had any problem they wished to discuss (TJ [163]).[9] (3) The respondent himself was told by the Chaplain to speak with him if he needed any assistance.[10] (4) The respondent could not discount that in his remaining years at school, subtle inquiries had been made of him by the headmaster and others with a view to gauging his condition but that, given his youth, he had not discerned the true focus of their inquiries.[11] (5) After experiencing difficulties in 1963, the respondent excelled at school (TJ[161]).

27. Gray J (FC [101]-[105]) ignored these uncontested facts and the unchallenged evidence of Mr Bean that counsellors and psychologists were not known within schools in the 1960's; the Chaplain was the obvious person to whom boarders went with a personal matter (TJ[162]).[12] Moreover, the development of guidelines on how schools should deal with allegations of sexual abuse are of recent origin, in part a response to the Debelle Royal Commission in 2012-2013 (TJ[162], [165]).[13]

The correct approach to the assessment of breach of duty

28. The respondent's case in negligence required that the appellant's conduct in 1961 and 1962 be judged by reference to the contemporary standards. Gray J adopted the same approach. In fact it was essential that the appellant's acts or omissions not be deconstructed by a standard informed by hindsight.[14] In *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 308-309, Mason, Wilson and Dawson JJ referred to the influence of contemporary developments on the standard of care: "...what reasonable care requires will vary with the advent of new methods... and with changing ideas of justice and increasing concern with safety in the community...". This approach supported the conclusion that the respondent had not proved a case in negligence.

Time limitation

29. Contrary to the respondent's submissions, one cannot sever vicarious liability from negligence when considering prejudice (RS[63]). The loss of evidence was highly material to both of these cases, as well as to causation, and therefore to the exercise of the discretion conferred by s 48 of the *Limitations Act*.

30. The trial judge's examination of the respondent's conduct after 1996 was both accurate and logical (TJ[217]-[221]) (cf RS[63]-[65]). The trial judge acknowledged the contradiction exposed by the respondent's involvement in other litigation, including proceedings against Bain. The respondent's submissions (RS[64]-[65]), and the approach of Kourakis CJ (FC[24]) and Gray J (FC[148]), overlooked primary policies behind provisions such as s 48 (see AS[71]-[75]). They also overlook the evidence: the respondent accepted that by October 1997 the appellant believed he was not going to sue.[15] That assumption was well founded given the negotiations and discussions (TJ[38]-[41]). The respondent's decision to sue in 2004[16]-2005[17] had nothing to do with not understanding his rights or entitlements in 1997: he simply changed his mind (TJ[220]).[18]

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[8] T91.4-92.13.
[9] T662.13-33.
[10] T662.13-33.
[11] T665.12-666.14.
[12] T1385.21-28; 1394.5-1396.10.
[13] T1364.25-1366.2.
[14] See, eg, *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317, [34] (McHugh J); *Road Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330, 353; *Vairy v Wong Shire Council* (2005) 223 CLR 422, [126]-[129].
[15] D44; T653.28-654.15.
[16] See the plaintiff's summary of his then pending or contemplated litigation action list in D33; T598.15-599.32.
[17] T453.2-13.
[18] T692.17-695.20.